Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

BILLIE BRYAN MACKEY, PETITIONER

*v.*

DONNA E. SHALALA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; EARL L. LAURENCE, INDIVIDUALLY; CLIFFORD MOSS, INDIVIDUALLY; RALPH BAIN, INDIVIDUALLY; HAROLD ROTH, INDIVIDUALLY

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

JOHN F. KARL, JR.
*Counsel of Record*
WILLIAM P. FARLEY
NANCY J. MALIR
MCDONALD & KARL
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200
*Attorneys for Petitioner*

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

## QUESTIONS PRESENTED

1. Whether the court of appeals failed to follow *Reeves v. Sanderson Plumbing Products., Inc.*, 530 U.S. 133 (2000), where plaintiff presented a *prima facie* case of discrimination and substantial evidence of pretext?

2. Whether the employer's violation of binding regulations, preselection and falsification of documents create a disputed question of fact on the issue of pretext?

3. Whether the court of appeals erred in refusing to address the merits of the appeal of petitioner's claims under the Administrative Procedure Act, where no other circuit has appellate jurisdiction?

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## PETITION FOR WRIT OF *CERTIORARI*

Petitioner, Billie Bryan Mackey, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 360 F.3d 463, App. 1a.[1] The decision of the United States District Court for the District of Maryland decision, granting Defendant's Motion for Summary Judgment on Mackey's claims of discrimination arising under Title VII of the Civil Rights Act of 1964, and declining to address Mackey's claims under the Administrative Procedure Act ("APA") is reported at 43 F. Supp.2d 559. App. 14a.

A prior decision of the United States Court of Appeals for the District of Columbia Circuit at issue in this petition is unreported. 1993 WL 20064, App. 40a. The decision of the U.S. District Court for the District of Columbia dismissing Mackey's APA claims and transferring the Title VII claims to Maryland is also unreported, 1991 WL 128510, *cert. denied sub nom, Mackey v. Moss*, 513 U.S. 1043 (1994), *reh. denied*, 513 U.S. 1122 (1995).[2] App. 42a.

## JURISDICTION

The United States Court of Appeals for the

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[1] References to the Appendix to this Petition are the page number followed by "a."

[2] The 1994 petition for *certiorari* addressed only the *Bivens* claims against the individual defendants and requested review of the District Court's ruling imposing a "heightened pleading standard" and requiring direct evidence of an unlawful motive.

Fourth Circuit denied Mackey's Petition for Rehearing or Rehearing *En Banc* on May 11, 2004. App. 39a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2003).

## RELEVANT PROVISIONS INVOLVED

The first statute at issue before this Court forbids discrimination against federal employees on the basis of gender under Title VII of the Civil Rights Act of 1964, as amended. The relevant provision, 42 U.S.C. §2000e-16(a) provides, among other things, "All personnel actions affecting employees . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."

The Administrative Procedure Act ("the APA"), 5 U.S.C. § 702, provides in relevant part that: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

## STATEMENT

### I. Background Facts

In 1980, Billie Bryan Mackey, already a highly experienced female scientist, became Director of the National Digestive Diseases Education and Information Clearinghouse (the "Clearinghouse") at the National Institutes of Health ("NIH") in Bethesda, Maryland. Mackey served at the GS-13 grade level and continued in that position until early 1985, satisfactorily performing her duties and responsibilities. App. 2a-3a, 15a. The Clearinghouse provides research information on digestive diseases to health care providers and organizations. As Director, Mackey worked with outside contractors, served as a liaison between the Clearinghouse and various digestive diseases committees, and chaired meetings of Clearinghouse

advisors. App. 2a-4a, 15a.

Ralph Bain began his employment at NIH in 1982 as a special expert, a non-federal short-term position created pursuant to the Intergovernmental Personnel Act, 42 U.S.C. §§4701 *et seq.* This position was originally designated as a two-year term appointment in which Bain acted as Executive Secretary of the Digestive Disease Advisory Board, while on leave from the Chemistry Department of the University of Southern Illinois. App. 3a, 16a.

On January 11, 1984, Earl Laurence, Executive Director of the National Institute of Arthritis, Diabetes, Digestive, and Kidney Diseases, directed that NIH hire Bain "ASAP," without competition, for a permanent Grade 14 position as a federal employee. App. 3a-4a, 16a-17a, 53a-54a.

However, because Bain was not a federal employee and worked on a project scheduled to end on September 30, 1984, the decision to hire Bain into a permanent Grade 14 position was regulated by the Office of Personnel Management ("OPM") certification requirements and NIH review and clearance regulations and procedures. App. 3a-4a, 16a-18a (citation omitted). These procedures, designed to overcome an under-representation of women in professional jobs at NIH, required NIH to advertise the position and to provide information concerning the candidates' qualifications, agency recruitment efforts, and the nature of the position. App. 3a-4a, 16a-18a (citation omitted).

These procedures are necessary in ensuring that its employment system, particularly with regard to conversion cases, adheres strictly to the merit principle and provides for fair and open competition for vacancies. App. 16a. Thus, when Laurence sought to convert Bain to the permanent position of Health Scientist Administrator, he was required to follow the

mandatory NIH and OPM procedures. App. 3a-4a, 16a-18a.

A position was advertised from February 21, 1984 to February 28, 1984 ("the February position").[3] The record establishes that this position was created especially for Bain by Laurence. App. 3a-4a, 16a-18a (citation omitted).[4]

After selecting Bain, Laurence filed the necessary paperwork with the Assistant Director of Operations for NIH's Department of Personnel Management ("DPM"), Helen Stafford, to convert Bain from the position of special expert to Health Scientist Administrator. However, Stafford denied the request because the February position created by Laurence involved short-term duties, which were inappropriate for a permanent civil service placement. App. 3a-4a, 16a-17a (citation omitted).

After his request to hire Bain was denied, Laurence created another, different position for Bain. This position, Program Director for Scientific Program Evaluation in the Division of Digestive Diseases, was permanent. A significant portion of the duties of the newly created position were already being performed by Mackey as Director of the Clearinghouse. App. 3a-4a, 17a-18a.

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[3] The court of appeals and district court decisions incorrectly state that the first position was advertised in 1994, not 1984.

[4] NIH failed to produce any documentary evidence that Bain actually applied for this position. The only job application ever produced by NIH was dated April 17, 1984, almost two months after the closing date for applications. Joint Appendix On Appeal ("JA") 896, 1091.

However, unlike the February position with its short-term duties, the position for Program Director for Scientific Program Evaluation was never advertised and no efforts were made to recruit candidates other than Bain. In spite of this, the paperwork for the new position that was submitted for DPM's approval falsely indicated that it was advertised and that eight candidates were considered for the position. App. 4a, 17a.

NIH hired Bain as a permanent federal employee at the Grade 14 level to perform duties and responsibilities previously performed by Mackey. App. 4a, 18a. Mackey had no opportunity to apply for the position that was actually filled, because it was never advertised. App. 4a, 18a.

With Bain in his new position, Mackey was stripped of her previous responsibilities. On February 21, 1985, after she filed complaints of discrimination and retaliation, Mackey was transferred to the Division of Extramural Affairs. There was no dispute in the District Court that the duties assigned to Mackey "are low-level functions that are more appropriate for a GS-7, GS-8, and GS-9 grade level employee." App. 32a.

**2. Proceedings Below**

Mackey filed administrative complaints of discrimination and retaliation with NIH. App. 4a-6a, 18a-20a. In 1989, Mackey's discrimination claims were consolidated and heard before an EEOC administrative law judge. App.4a-6a, 18a-20a. NIH issued a final agency decision accepting the findings against Mackey. App. 20a.

**A. Litigation in the District of Columbia**

In January,1990, Mackey filed Title VII sex discrimination and retaliation claims against NIH in the U.S. District Court of the District of Columbia. Mackey also raised claims against NIH under the APA and filed

*Bivens* claims against several NIH officials involved in Bain's hiring. App 5a-6a.

On the Defendant's Motion to Dismiss All Claims Except Those Based on Title VII or, in the Alternative, for Summary Judgment, and to Transfer Plaintiff's Title VII Claims, U.S. District Judge Hogan ruled that Mackey failed to state a claim under the APA. App. 50a-51a. The court also granted NIH's motion to transfer the Title VII claims to the District of Maryland on the grounds that the District of Columbia was an improper venue. Judge Hogan dismissed the *Bivens* claims against the individual defendants. App. 42a.

Mackey appealed to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the dismissal of the *Bivens* claims against the individual defendants and the transfer of Mackey's Title VII claims to the U.S. District Court in Maryland. App. 40a-41a.

**C. Litigation in the U.S. District Court for the District of Maryland**

On April 26, 1999, the U.S. District Court for the District of Maryland granted NIH's motion for summary judgment against Mackey's sex discrimination claim. App. 14a. The District Court required Mackey to "establish that the adverse employment decision would not have been made 'but for' for her protected class status." App. 22a (citation omitted). The trial court ruled that Mackey failed to demonstrate she was rejected for the position, even though the court noted the "the apparent circumvention of NIH's hiring and promotion procedures." App. 27a. The trial court ruled that the "hiring of Bain was in violation of established OPM and NIH policies and procedures" but was not probative on the issue of pretext. App. 27a. "A discriminatory motive, cannot, as a matter of law, be invariably inferred from alleged violations of NIH's

hiring policies." App. 28a (citation omitted).

In ruling on Mackey's retaliation claims, the court concluded that "Mackey can make out a prima facie case for retaliation under Title VII." App. 33a. The district court noted, "it is undisputed the she engaged in protected activity when she lodged her series of complaints with the EEO counselor." App. 33a. The court also ruled that the reassignment of Mackey to the DEA "entailed a substantial change in her job duties and responsibilities [and] constituted an adverse employment action." App. 33a. The court found "there is sufficient evidence in the record to raise more than an inference that a causal connection existed between the protected activity and the adverse action." App. 33a. The court ruled: "Defendant has failed to produce sufficient admissible evidence that its proffered reason was legitimate and non-discriminatory." App. 34a. Since the only evidence that NIH has produced is "not legally sufficient to justify a judgment for ***Defendant***," the district court denied Mackey's motion for summary judgment on her claim of retaliation. App. 34a (emphasis added).

The district court denied plaintiff's motion for partial summary judgment on her APA claims arising out of the cancellation of the grievances she filed pertaining to violations of OPM and NIH hiring policies, on the grounds the District Court in the District of Columbia had dismissed them and "they may not be relitigated again here." App. 35a.

After a two-day bench trial in September of 1999, the district court entered judgment for NIH on Mackey's retaliation claim.[5] App. 6a. Mackey timely appealed.

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[5] The decision of the Maryland District Court dismissing Mackey's retaliation claims is not at issue in this petition.

**C. Appeal to U. S. Court of Appeals for the Fourth Circuit**

In affirming the grant of summary judgment on Mackey's discrimination claims, the Court ruled that NIH offered a legitimate non-discriminatory explanation for hiring Bain as NIH claimed Bain was better qualified. App.7a-9a. The court of appeals ruled: "Mackey must demonstrate that the reason for hiring Bain advanced by NIH was pretextual." App. 8a.

The court of appeals concluded:

The record in this case, however, essentially is without evidence that HHS's explanation is pretext or that Mrs. Mackey suffered from intentional sex discrimination. In the end, her argument in this case is that her superiors at NIH violated standard hiring procedures by preselecting Bain and placing him into a position that took over many of Mrs. Mackey's duties, and then her superiors falsified records to cover their violations of hiring procedures. Even if Mrs. Mackey's allegations are true, Bain's preselection is not sufficient evidence for jurors reasonably to conclude that HHS's explanation for Bain's hiring was pretext.

App. 8a. The court specifically rejected Mackey's evidence of preselection, *citing Kennedy v. Landon*,598 F.2d 337, 341 (4th Cir.1979) that holds preselection "does not evidence the type of discrimination prohibited by Title VII." App. 8a.

The Fourth Circuit rejected Mackey's appeal of the APA claims without ever reaching the merits. The court held: "There is no authority which would allow us to review the decisions of the United States Court of Appeals for the District of Columbia Circuit or the District Court for the District of Columbia." App. 12a, n.2. The court did "not address further that part of Mrs. Mackey's appeal." App. 12a, n.2.

Relying on Fourth Circuit precedent, the court of

appeals declined to review the refusal of summary judgment to the plaintiff on her retaliation claims. App. 9a, *citing Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*, 51 F.3d 1229, 1234 (4th Cir.1995).

**REASONS FOR GRANTING THE PETITION**

The Court should grant the petition for review because the petition raises important questions of continuing national importance regarding the amount of additional evidence, if any, plaintiff must produce beyond her *prima facie* case of discrimination to avoid defendant's motion for summary judgment or judgment as a matter of law. Here, the lower court noted Mackey presented evidence of pretext where Laurence violated its hiring regulations by preselecting Bain, and her superiors falsified government records to cover their violations of hiring procedures, but held this evidence was insufficient to avoid summary judgment. App 8a. In affirming the grant of summary judgment, the court of appeals below failed to follow the Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The courts of appeal have split regarding the meanings of *Reeves* and the amount and nature of evidence necessary to avoid summary judgment. The courts of appeal for the First, Second, Fourth, and Fifth Circuits that followed the "pretext plus" standard have not changed the substance of their analysis, notwithstanding the Court's explicit rejection of the "pretext plus" analysis in *Reeves*, 530 U.S. at 140, 148. These courts are not faithful to the teachings of *Reeves* and have ignored the admonition of Justice Ginsburg that cases where additional evidence of discrimination is required will be "uncommon," where plaintiff demonstrates a *prima facie* case and presents evidence of the employer's mendacity. *Reeves*, U.S. at 154

(Ginsburg, J., concurring).

The petition also addresses the important issue on which the courts of appeal split regarding the probative value of violation of law and regulations, preselection, and falsification of government records in proving pretext and hence in proving discrimination. Although other courts of appeal find such evidence probative of the issue of discrimination, the Fourth Circuit held Mackey's evidence, combined with plaintiff's *prima facie* case, did not entitle Mackey to a trial on the merits of her discrimination claims. App. 8a-9a.

Finally, the petition raises the important issue of whether the transferee court has jurisdiction over Mackey's appeal of the dismissal of her APA claims by the district court in the District of Columbia, and whether Mackey is entitled to review of the merits of her APA claims after the entry of final judgment, pursuant to 28 U.S.C. §1291. The Fourth Circuit ruled that it could not review Mackey's APA claims on appeal, even though under the law of the District of Columbia Circuit, the U.S. Court of Appeals of the District of Columbia Circuit did not have jurisdiction to review the interlocutory rulings made prior to transfer. The Fourth Circuit's refusal to address the merits of the dismissal of Mackey's APA claims deprived Mackey of her statutory right of appeal on the merits under 28 U.S.C. §1291.

**I. *CERTIORARI* SHOULD BE GRANTED TO CORRECT THE FAILURE OF THE LOWER COURTS TO FOLLOW *REEVES* AND TO RESOLVE A SPLIT IN THE CIRCUITS AS TO THE LEVEL OF PROOF REQUIRED FOR PLAINTIFF TO SURVIVE SUMMARY JUDGMENT IN DISCRIMINATION CASES**

Mackey established a *prima facie* case of sex discrimination in promotion. In order to establish a

*prima facie* case, the plaintiff must establish that (1) she is a member of a protected class; (2) her employer had an open position for which she applied or for which she would have applied; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Lams v. General Waterworks Corp.*, 766 F.2d 386, 391 (8th Cir. 1985); *Ostroff v. Employment Exchange, Inc.*, 683 F.2d 302 (11th Cir. 1982); *EEOC v. Ford Motor Co.*, 645 F.2d 183 (4th Cir. 1981); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1338 (9th Cir. 1981).

The court of appeals correctly assumed that Mackey established a *prima facie* case. App.8a-9a. Mackey, as a woman, is a member of a protected class. NIH had an open position for which Mackey would have applied, if she had the opportunity. Mackey could not be required to apply for the position as part of her *prima facie* case because the position that was ***actually filled*** was never advertised.[6] App. 4a, 18a, 35a-36a, n. 3.

Mackey was more qualified for the position ***actually filled*** because of her administrative experience (the most important selection factor), her expertise in information retrieval, her substantive knowledge of the digestive diseases covered by the Institute, and her education. Mackey was also qualified

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[6] An employee's failure to apply for a position is "frequently excused where the employer has no formal application process or where the employee is unaware of the opportunity." *Lockridge v. Board of Trustees of the University of Arkansas*, 294 F.3d 1010, 1014 (8th Cir. 2002) (citations omitted); *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1213 (2nd Cir. 1993).

because she demonstrated an ability to successfully perform the duties and responsibilities of the position because she successfully performed these before they were given to Bain to justify his position. App. 18a, JA 1077-1078, 1289-1291. Mackey previously expressed an interest in a promotion to GS-14 and would have applied for the position had she known it was available. JA 894.

Mackey certainly demonstrated she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. In January, 1984, Laurence, a white male, acting in secret, directed that Bain, also a white male, be hired "ASAP" into an unadvertised GS-14 position without competition. App. 35a, n.3, 53a-54a. When Stafford prevented him from hiring Bain for the February position, Laurence simply created a new position based on Mackey's duties and then transferred Mackey to a position with lower level clerical duties.[7] App. 4a-5a, 17a-18a.

The court of appeals ruled that NIH "advanced a nondiscriminatory reason for hiring Bain, arguing that he was better qualified." App. 7a. The court ruled "Mackey must demonstrate that the reason for hiring Bain advanced by HHS was pretextual." App. 8a. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (burden is one of production, not persuasion; it can involve no credibility assessment) (citation omitted).

However, the Fourth Circuit concluded that: "Even if Mrs. Mackey's allegations are true, Bain's preselection is not sufficient evidence for jurors

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[7] The fact that Mackey sought a promotion, while Bain was a new hire does not prevent Mackey from establishing a *prima facie* case. *Cones v. Shalala*, 199 F.3d 512, 517 (D.C. Cir. 2000).

reasonably to conclude that HHS's explanation for Bain's hiring was pretext." App. 8a. The Fourth Circuit's holding is inconsistent with *Reeves* because that court failed to recognize the probative value of the NIH's "violati[on] of standard hiring procedures by preselecting Bain and placing him into a position that took over many of Mrs. Mackey's duties," as well as the fact that Mackey's "superiors falsified records to cover their violations of hiring procedures." App. 8a.

In *Reeves*, this Court held that evidence of the employer's mendacity is always relevant because "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 147. The Court continued:

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

*Id.*, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

The Court further held that: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.*, *citing St. Mary's Honor Center*, 509 U.S. at 517 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.").

The *Reeves* Court held that: "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is

dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id.* (citations omitted).

The court of appeals noted that Laurence "violated standard hiring procedures by preselecting Bain and placing him into a position that took over many of Mackey's duties," but discounted the probative value of this evidence, concluding it was insufficient to withstand summary judgment. App. 8a-9a. In determining that Mackey's evidence was insufficient to support a finding of discrimination, the lower court improperly weighed Mackey's evidence and failed to follow *Reeves*. Laurence's actions in violating mandatory hiring procedures, preselecting Bain and placing him into a position with many of Mackey's duties has enormous probative value. The evidence shows that Laurence ordered Bain hired "ASAP" without competition. App. 53a-54a. After Stafford blocked Laurence's attempt to hire Bain into the first job advertised in February, Laurence circumvented NIH's rules and manufactured false documents in order to hire Bain into a newly created position based on Mackey's job duties. Stafford testified that the hiring of Bain "would not have gone through" had she known of the false representations. JA 1322-1323.

If Bain were better qualified for the position than Mackey, or even if Laurence held a "sincere belief" that Bain was better qualified, Laurence surely would have complied with the law and publicly announced the position and allowed qualified candidates to apply and compete for the position. The best qualified candidate could have been chosen, based on NIH's objective rating criteria.

Laurence's refusal to comply with NIH's

regulations and his decision to violate the mandatory requirement that the position be permanent and that it be advertised prior to the selection indicates that Laurence knew Bain could not win a fair and open competition for the position because he was less qualified than Mackey. The evidence thus supports the inference that agency officials knew Bain was less qualified than Mackey because he lacked relevant administrative and substantive experience and would not be selected in a fair, competitive selection process that was not rigged in advance. The agency's actions are evidence that Bain was hired because of his gender and not because he was the "best qualified" for the position. This is the most logical explanation for the actions taken by agency officials and for the subsequent cover-up.

As Justice Ginsburg stated in *Reeves*: "Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide." But the "inference [of discrimination] remains–unless it is conclusively demonstrated . . . , that discrimination could not have been the defendant's true motivation." 530 U.S. at 155 (Ginsburg, J., concurring). NIH certainly presented no evidence to "conclusively demonstrate[]" that Bain was better qualified where Laurence never compared the qualifications of Mackey and Bain against the requirements of the position.

As Justice Ginsburg observed: "If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above." Where plaintiff has established a *prima facie* case and has presented compelling and largely undisputed evidence of defendant's dishonesty about material facts, Mackey is not required to submit

additional evidence to survive a motion for summary judgment.

"Most commentators and courts of appeal have interpreted *Reeves* to hold that a prima facie case and credible evidence of pretext demonstrates an issue of fact for the jury to resolve." D.J. Turek, "Affirming Ambiguity: *Reeves v. Sanderson Plumbing Products, Inc.* and the Burden-Shifting Framework of Disparate Treatment Cases," (henceforth "Affirming Ambiguity") 85 Marq. L. Rev. 283, 304 (Fall, 2001) (footnote omitted). Thus, if conflicting evidence exists regarding the veracity of an employer's reasons for its adverse action, a genuine issues arises as to the existence of discrimination." *Id.* (footnote omitted).

Most of the courts of appeal have correctly interpreted *Reeves*, concluding that no additional evidence of discrimination is needed for plaintiff to survive summary judgment where plaintiff makes a *prima facie* case and a showing of pretext. *E.g.*, *Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 319, 321 (3rd Cir. 2000) ("if the employer is able to proffer a legitimate nondiscriminatory reason for its actions, the plaintiff must demonstrate that the proffered reason was merely a pretext for unlawful discrimination"); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (6th Cir. 2001) (when the elements of a *prima facie* case have been met, a plaintiff need not show both pretext and discriminatory intent); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 428 (7th Cir. 2000) (recent decision in *Reeves* was a "cautionary note not to grant summary judgment too readily when facts are susceptible to two interpretations"); *Yates v. Rexton, Inc.*, 267 F.3d 793, 800-801 (8th Cir. 2000) (reversing summary judgment); *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080, 1094 (9th Cir. 2001) (on summary judgment court must determine whether a plaintiff has "provided

sufficient evidence to support a finding of pretext"); *Lundien v. United Airlines*, 242 F.3d 389 (10th Cir. 2000) (Table) (plaintiff survives summary judgment where she supplies evidence of a *prima facie* case and shows pretext in the employer's legitimate reasons) (reversing summary judgment); *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 831-32 (11th Cir. 2000) (reversing summary judgment for employee who produced believable pretext evidence).

Prior to *Reeves*, the First, Second, Fourth and Fifth Circuits adopted the "pretext plus" test which required a plaintiff to demonstrate after proving pretext that defendant's true motive was discriminatory. The Court cited cases from these circuits in explaining the decision to grant *certiorari* in *Reeves* and directly overruled this line of cases. *Id.* at 141-142. However, those circuits have failed to follow *Reeves*.

The Fourth Circuit cited *Reeves* in passing in its opinion, App. 8a, but continued to follow the "pretext plus" approach. Instead of following Justice Ginsburg's admonition that summary disposition of cases where "additional evidence beyond the *prima facie* case combined with the employer's mendacity will be "uncommon," *Reeves*, 530 U.S. at 154, the court of appeals below discounted Mackey's *prima facie* case, improperly weighed the evidence, discounted the probative value of Laurence's mendacity and the fabrication of documents, and conducted its own assessment of the evidence. App. 6a-9a.

As one commentator observed, "After taking issue with the Supreme Court's characterization of its prior decisions as consistent with the pretext plus standard, the First Circuit has declared its previous opinions consistent with *Reeves* and continues to operate in the same manner it did prior to *Reeves*." R. Vantrease, "The Aftermath of *St. Mary's Honor Center*

*v. Hicks* and *Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification, (henceforth "A Call for Clarification") 39 Brandeis L.J. 747, 754 (Spring 2001), *citing Feliciano de la Cruz v. El Conquistador Resort, on denial of rehearing*, 2000 WL 1124587 (1st Cir. July 31, 2000).[8] Thus, the First Circuit does not recognize that *Reeves* overruled the Circuit's "pretext plus" approach and takes the view that: "*Reeves* reinforced the prior law in this circuit that even if the trier of fact disbelieves the nondiscriminatory explanation given by the employer, the trier is not compelled to find that the real reason was discrimination." *Zapata-Matos v. Beckitt & Colman, Inc.*, 277 F.3d 40, 45 (1st Cir. 2000) (citation omitted). Noting the "facts of each case are important," the First Circuit engages in a "case by case weighing" of the evidence and concluded that "the slight suggestion of pretext present here," absent other evidence of discrimination, did not meet plaintiff's ultimate burden. *Id.* at 47.

The Second Circuit also continues to attempt to explain away *Reeves* and continues to analyze circumstantial evidence in intentional discrimination cases, just as it did prior to *Reeves*. The Court cited *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), a second Circuit case, as a case that had erroneously applied "pretext plus." *Reeves*, 530 U.S. at 148. In responding to *Reeves*, the Second Circuit stated: "With all respect the Court was mistaken" in its analysis of *Fisher*. *James v. New York Racing Ass'n*, 233 F.3d 149, 156 n. 3 (2d Cir. 2000); *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000) (affirming summary judgment

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[8] The panel decision was issued days before *Reeves* and may be found at 218 F.3d 1, 8 (1st Cir. 2000).

and declining to hold that a *prima facie* case and evidence of pretext is always sufficient to survive summary judgment).

The Fifth Circuit also retains elements of the "pretext plus" analysis, even after *Reeves*. *E.g.*, *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 903-904 (5th Cir. 2000) (evidence of pretext was weak and therefore insufficient to support an inference that the real reason was discrimination); *Price v. Fed. Express Corp.*, 283 F.3d 715, 723, 725 (5th Cir. 2002) (even assuming plaintiff "presented evidence showing that FedEx's explanation is pretextual, his evidence of pretext does not support an inference that intentional discrimination was the real reason for his employment decision").[9]

"[M]ost of the circuits have rationalized their pre-*Reeves* pretext oriented framework" in the decisions issued since *Reeves*. R. Vantrease, "A Call for Clarification," 39 Brandeis L.J. at 769. "*Reeves* has had a negligible impact on the pre-*Reeves* circuit split" and the "post-Reeves disparate treatment environment is alarmingly similar to the pre-*Reeves* uncertainty." Turek, "Affirming Ambiguity," 85 Marq L. Rev. at 303, 310.

The Court should grant review of the courts of appeals' failure to follow the teachings of *Reeves* and decide whether a plaintiff who establishes a *prima facie* case and presents compelling and largely undisputed evidence of defendant's dishonesty about material facts is entitled to a trial of her claims of discrimination. The Court's decision in *Reeves* "has left courts struggling to

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[9] *See also Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2000) (*Reeves* affirmed law of the circuit in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989,993, 994 (5th Cir. 1996 (*en banc*).

discern the precise factual formulas required for a plaintiff to survive summary judgment." M.A. McRae and J.L. Roeschlein, "Proof and Pretext," 27 MAR L.A. Law 22. As one commentator noted,

> a call for clarification is in order. It is both appropriate and necessary for the Supreme Court to review and revise its holding in *Hicks* and *Reeves* in order to hand down a steady, clearly and workable framework so that the circuits may be consistent in their analysis of employment discrimination lawsuits.

R. Vantrease, "A Call for Clarification," 39 Brandeis L.J. at 771.

This is "an appropriate case" to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond the *prima facie* case and evidence of pretext in order to survive a motion for judgment as a matter of law, and to decide whether cases where additional evidence beyond the *prima facie* case combined with the employer's mendacity will be "uncommon." *Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring).

The Court should grant the petition to resolve the split in the circuits that has continued despite the Court's decision in *Reeves* and issue a clear and workable framework so the circuits' analysis of evidence of discrimination be consistent and to end the "uncertainty in the disposition of disparate treatment claims." Turek, "Affirming Ambiguity," 85 Marq. L. Rev. at 310.

**II. *CERTIORARI* SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE CIRCUITS AS TO WHETHER THE EMPLOYER'S VIOLATION OF BINDING REGULATIONS, PRESELECTION AND FALSIFICATION OF DOCUMENTS CREATE A DISPUTED QUESTION OF FACT ON THE ISSUE**

**OF PRETEXT**

In rejecting the probative value of Laurence's violation of NIH and OPM regulations, the preselection of Bain, and falsification of documents, the panel relied on the Fourth Circuit's prior decision in *Kennedy, supra.* App. 8a. This reliance was misplaced because in *Kennedy* the employee conceded that the selectee was better qualified. *Id.* 598 F.2d at 341. Here, on the other hand, there is a dispute of material fact because the evidence demonstrates Mackey was better qualified than Bain. *Bell v. Environmental Protection Agency*, 232 F.3d 546, 551 (7th Cir. 2000) (agency "cannot escape scrutiny merely by claiming that they selected the most qualified candidates".

Although the agency articulated a legitimate nondiscriminatory reason for the selection of Bain, there is a dispute of material fact as to whether this is true. Since employers always insist they hired or promoted the most qualified candidates, Laurence's conclusory and unsupported assertion that Bain was hired because he holds a Ph.D. is entitled to little weight, particularly in view of his preselection of Bain and fabrication of false documents. Although Bain had a Ph.D. in inorganic chemistry, that degree was irrelevant to the actual objective requirements of the position. The position filled by Bain was not a research position, but one requiring administrative and substantive experience in digestive diseases. JA 1289-1290.

Mackey presented evidence that she was more qualified than Bain when her qualifications and relevant experience are measured against the actual objective requirements of the position. According to the official NIH rating criteria for the position, experience is the major factor for determining qualifications. JA 1290. NIH's objective criteria state that a Ph.D. is ***not*** required

for the position at issue, which is an administration position. JA 1290.

Bain had no experience in administering federal research grants prior to coming to NIH. JA 1091. NIH's regulations bar the agency from considering any experience Bain may have gained while employed by NIH as a special expert. JA 1107-1108. Further, it is evident that Bain's experience as chairman of a university chemistry department is not administrative experience relevant to the federal grants process and is not comparable to Mackey's experience. Mackey had relevant experience because she had been doing the job given to Bain since 1980.

Further, NIH could ***not*** hire Bain as a permanent federal employee without advertising the position into which he was hired. Bain was thus absolutely unqualified for the position for which he was hired because he could never be "qualified" for a position that was not advertised. NIH's failure to satisfy the legal prerequisites for hiring a special expert or creating a permanent position and advertising the position into which Bain was actually hired renders Bain completely unqualified for the position as a matter of law.

Thus, there is a dispute of material fact as to the qualifications of the candidates to be resolved by the trier of fact. When an employer contends that a [Title VII] plaintiff was not as qualified as the successful candidates, pretext can be inferred from evidence that plaintiff was in fact more qualified than those chosen. *Martinez v. Wyoming Dep't of Family Servs.*, 218 F.3d 1133, 1139 (10th Cir. 2000) (citation omitted).

In rejecting the probative value of the unlawful selection and the preselection of Bain, the panel failed to follow *Reeves* and created a split with other circuits. Initially we note that the regulations adopted by OPM and NIH were mandatory and not optional. *Vitarelli v.*

*Seaton*, 359 U.S. 535 539-40 (1959) (governmental agencies are bound by their own regulations). Violation of these regulations is probative evidence of discrimination. *Giacoletto v. Amax Zinc Co., Inc.* 954 F.2d 424, 427 (7th Cir. 1992) (failure to comply with its own procedures is evidence of pretext); *Williams v. DeKalb County*, 577 F.2d 248, 255 (5th Cir.), *modified on other grounds*, 582 F.2d 2 (5th Cir. 1978) (vacating judgment in favor of county because of procedural irregularities in filling positions); *Watson v. National Linen Service*, 686 F.2d 877 (11th Cir. 1982) (finding of nondiscrimination is "clearly erroneous" where employer chose unqualified candidate who was improperly selected).

Further, failure to comply with agency procedures is particularly powerful evidence of pretext and discriminatory intent because preselection in federal employment is always unlawful. *Krodel v. Young*, 748 F.2d 701, 705, 709 (D.C. Cir. 1984) (improper selection procedures relevant to determination that employer's nondiscriminatory explanation unworthy of belief) (citation omitted), *cert. denied*, 474 U.S. 817 (1985); 5 U.S.C. §2301; 5 U.S.C. §2302. An employer's preselection of a job candidate, in violation of its own procedures requiring fair consideration of qualified applicants, is "undeniably relevant to the question of discriminatory intent," and "operates to discredit the employer's proffered explanation for its employment decision," *Kolstad v. American Dental Association*, 108 F.3d 1431, 1437 (D.C. Cir. 1997), (citations omitted) (internal quotations omitted), *r'vd on other grounds*, 139 F.3d 958 (1998) (*en banc*), *r'vd on other grounds*, 527 U.S. 526 (1999).

Other courts of appeal have concluded evidence of preselection discredits the employer's proffered explanation for its employment decision and casts

serious doubt on the credibility and legitimacy of the proffered reasons for selection. *Goostree v. State of Tenn.*, 796 F.2d 854, 861 (6th Cir. 1986); *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 728 (8th Cir. 1982) (preselection, in the form of "tailoring" job qualifications to those of a particular candidate, violates Title VII); *see Evans v. City of Bishop*, 238 F.3d 586 (5th Cir. 2000)(failure to compare qualifications of plaintiff to those of the winner is evidence of pretext).

A defendant's failure to follow its own written policy can be evidence of pretext. *Beaird v. Seagate Tech., Inc.*,145 F.3d 1159, 1168 (10th Cir.1998) (plaintiff can show defendant's reason for termination during reduction in force is pretextual if defendant did not follow own policy); *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1024 (8th Cir. 1998) (violations of employee policy manual "lends support to an inference of improper motive"); *Futrell v. J.I. Case*, 38 F.3d 342, 349 (7th Cir.1994) (employer's failure to follow its own procedures is relevant to a showing of pretext).

The Fourth Circuit also discounted the evidentiary value of the fact that Mackey's "superiors falsified records to cover their violations of hiring procedures." App. 8a. This is contrary to the views of the other circuits. *E.g.*, *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 921-922 (3rd Cir. 1985) (wrongdoing by the party in connection with his case, amounting to an obstruction of justice, is also commonly regarded as an admission by conduct) (citation omitted); *United States v. Kaplan*, 832 F.2d 676, 687 (1st Cir. 1987) (evidence that lawyer-defendant removed its files prior to a government search and that the government could not find them was properly admitted); *United States v. Fozo*, 904 F.2d 1166, 1170 (7th Cir. 1990) ("script" written by one defendant for his codefendant's testimony in their trial for giving willfully

false testimony was admissible).

The Court should grant review to resolve the split in the Circuits on the probative value of evidence of preselection, violation of federal regulations, and policies and fabrication of documents on the issue of pretext.

## III. *CERTIORARI* SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE CIRCUITS AS TO WHETHER THE TRANSFEREE COURT OF APPEALS HAS JURISDICTION TO REVIEW INTERLOCUTORY ORDERS FROM TRANSFEROR CIRCUIT

The district court in Maryland noted "the apparent circumvention of NIH's hiring and promotion procedures." App. 27a. The Fourth Circuit appeared to share the view there was evidence that NIH violated "standard hiring procedures by preselecting Bain and placing him into a position that took over many of Mrs. Mackey's duties." App. 8a. However, the court of appeals stated: "There is no authority which would allow us to review the decisions of the United States Court of Appeals for the District of Columbia Circuit or the District Court for the District of Columbia." App. 13a. As a result, Mackey was denied her statutory right to appeal the merits of her APA claims.

The decision of the district court for the District of Columbia dismissing Mackey's APA claims against NIH was interlocutory because the Title VII claims against NIH were transferred to Maryland and there was no appellate jurisdiction over the claims against the federal government because there was no final order as to the federal defendants. App. 40a-41a. The order dismissing Mackey's APA claim was interlocutory in nature because of the pendency of the Title VII claims and was therefore not a final appealable order. *Catlin v. United States*, 324 U.S. 229, 233 (1945); *Hill v.*

*Henderson*, 195 F.3d 671, 672-674 (D.C. Cir. 1999); *Reuber v. United States*, 773 F.2d 1367, 1368 (D.C. Cir. 1985) (dismissal of a party was final judgment reviewable in court of appeals, despite absence of Rule 54(b) order).

There is a split in the circuits as to whether a transferee court of appeals has jurisdiction over a ruling issued by a transferor court. The majority rule expressed by Judge Learned Hand is: "The review of any order of the district court in a transferred cause, made before transfer, is within the jurisdiction of the court of appeals of the circuit to which the cause has been transferred." *Magnetic Eng'g & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866, 870 (2nd Cir.1950); *Mackensworth v. S.S. Am. Merchant*, 28 F.3d 246, 249-52 (2nd Cir.1994). This rule is followed by most of the circuits addressing the issue. *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 700 (6th Cir.1999); *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir.1992); *Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 228 (3rd Cir.1990); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773 n. 9 (3rd Cir.1984); *see also American Fidelity Fire Ins. Co. v. United States Dist. Ct.*, 538 F.2d 1371, 1377 n. 4 (9th Cir.1976) (refusing to grant mandamus because a transfer order is reviewable after final judgment even if transferor court was not within its circuit).

However, several courts of appeal have reached the opposite conclusion holding that the court of appeals had no jurisdiction over appeals of dismissals by the transferor court. *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 954 (10th Cir.1989) (appeal of decision rendered in another circuit barred by 28 U.S.C. §1294(1)); *Roofing & Sheet Metal Serv. v. La Quinta Motor Inns*, 689 F.2d 982, 986-87 (11th Cir.1982); *Linnell v. Sloan*, 636 F.2d 65, 67 (4th Cir.1980).

The approach taken by the D.C. Circuit is based

on sound policy considerations:

> In fact, there seems no great reason to suppose that insistence on the ordinary final judgment rule is unsuitable in the context of claim transfer. Temporarily withholding review of a dismissal of fewer than all the claims may eliminate any need for appellate review (as where the recovery satisfies the plaintiff), and may confine a package of related issues to one court, one time.

*Hill*, 195 F.3d at 674. Further, as the Tenth Circuit acknowledged, its interpretation of 28 U.S.C. §1294(1) creates a "jurisdictional hiatus" and orphaned claims which are denied appellate review on merits. *McGeorge*, 871 F.2d at 954.

Under the law of the District of Columbia Circuit, only the U.S. Court of Appeals of the Fourth Circuit has jurisdiction over the interlocutory rulings made by the U.S. District Court for the District of Columbia. Under the law of the Fourth Circuit, Mackey's only right of appeal is to the District of Columbia Circuit. The ruling below denies Mackey's statutory right to appeal the merits of her APA claims and conflicts with the rulings of most courts of appeal that the court of appeals in the transferee circuit has jurisdiction over interlocutory orders entered prior to the transfer.

Even if the decision of the D.C. Circuit is read as a decision on the merits of Mackey's APA claims, the Fourth Circuit is not bound by the merits of rulings made in the District of Columbia Circuit. *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (law of transferor forum "merits close consideration, but does not have *stare decisis* effect in a transferee forum"), *aff'd*, 490 U.S. 122 (1989). As then Circuit Judge Ruth Bader Ginsburg wrote: "The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an

obligation to engage independently in reasoned analysis." *Id.*

As a result of this split in the circuits, Mackey was deprived of her statutory right to appeal the erroneous dismissal of her APA claims, in violation of the plain language of 28 U.S.C. §1291 and Circuit Judge Ginsburg's analysis. The Court should grant review to determine which court of appeals has jurisdiction over her appeal of the APA claims.

## CONCLUSION

The Court should grant the petition to resolve the split in the circuits as to the correct interpretation of *Reeves*. The Court should grant the petition to resolve the split in the circuits on the probative evidentiary value of the violation of binding agency regulations, preselection, and creation of false documents for showing pretext.

The petition should also be granted to resolve the split in the circuits as to whether petitioner had a statutory right to appeal the merits of the dismissal of her APA claims to the Fourth Circuit, where the transferor circuit denies appellate jurisdiction.

Respectfully submitted,

Bradley G. McDonald
John F. Karl, Jr. *
Nancy J. Malir
McDonald & Karl
900 17th Street, N.W.
Suite 1250
Washington, D.C. 20006
(202) 293-3200
Counsel for Petitioner
* Counsel of Record

No. 99-2582

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BILLIE BRYAN MACKEY,
Plaintiff-Appellant,

v.

DONNA E. SHALALA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; EARL L. LAURENCE, Individually; CLIFFORD MOSS, Individually; RALPH BAIN, Individually; HAROLD ROTH, Individually,
Defendants-Appellees.

November 2, 2000, Argued

March 16, 2004, Decided

COUNSEL: ON BRIEF: Bradley G. McDonald, Jodi T. Tuer, MCDONALD & KARL, Washington, D.C., for Appellant.

Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellees.

ARGUED: John F. Karl, Jr., MCDONALD & KARL, Washington, D.C., for Appellant.

Albert David Copperthite, Assistant United States Attorney, Baltimore, Maryland, for Appellees.

JUDGES: Before WIDENER and KING, Circuit Judges, and Margaret B. SEYMOUR, United States District Judge for the District of South Carolina, sitting by designation. Judge WIDENER wrote the opinion in which Judge KING and Judge SEYMOUR concurred.

OPINION: WIDENER, Circuit Judge:

Billie Bryan Mackey brought suit against the Department of Health and Human Services (HHS) in 1990, and her claims included sex discrimination and retaliation in violation of Title VII. She now appeals the district court's grant of summary judgment against her claim of sex discrimination. Mrs. Mackey also appeals the district court's denial of her motion for summary judgment on her claim of retaliation and its entry of judgment against this retaliation claim after a bench trial. We affirm the judgment in favor of the defendant on the sex discrimination claim. As to the retaliation claim, we decline to review the refusal of summary judgment to the plaintiff, see Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp., 51 F.3d 1229, 1234 (4th Cir. 1995), and affirm the judgment after trial in favor of the defendant.

I.

In 1980, Mrs. Mackey became NIH's Director of the National Digestive Diseases Education and Information Clearinghouse (Clearinghouse), a GS-13 grade position, and she continued in that position until 1984. The Clearinghouse worked to make information generated by research on digestive diseases available to medical practitioners. As director, Mrs. Mackey's duties included chairing meetings of the Clearinghouse

advisors, working with outside contractors, and serving as liaison between the Clearinghouse and various digestive disease committees.

On February 15, 1984, Mrs. Mackey received a memorandum from Dr. Harold Roth, Director of the Division of Digestive Services, informing her that Dr. Ralph Bain was to become her immediate supervisor. Later, Mrs. Mackey would learn that Bain would also assume most of her duties as Director.

Bain began his employment with the Clearinghouse working in the office of Dr. Roth under the Intergovernmental Personnel Act, while on leave from the Chemistry Department of the University of Southern Illinois. Bain was appointed a "special expert" at NIH about 1982, and he worked at the Clearinghouse as Executive Secretary of the Digestive Disease Advisory Board. In 1984, Earl Laurence, Executive Director of the National Institute of Arthritis, Diabetes, Digestive, and Kidney Diseases, made a request to convert Dr. Bain's position to that of Health Scientist Administrator, a permanent federal employee position. The position of Health Scientist Administrator as a federal employee was advertised from February 21, 1994 to February 28, 1994, and Bain was selected. It is undisputed that Mrs. Mackey never applied for the position.

The request to convert Bain's position to the Health Scientist Administrator position was ultimately denied by an official in NIH's Department of Personnel Management because the position, as described by Laurence, involved short-term duties, which were considered inappropriate for a permanent civil service

placement. Thereafter, Laurence created a different position for Bain, Program Director for Scientific Program Evaluation. A significant portion of the duties of that new position were already being performed by Mrs. Mackey. This position apparently was never advertised, yet paperwork was submitted to NIH's Division of Personnel Management indicating that the position had been advertised and that eight people had been interviewed. Bain was recommended for this second position and was approved. Thereafter, Mrs. Mackey was no longer allowed to serve as liaison between the Clearinghouse and the other digestive disease committees or serve as chairman of meetings of Clearinghouse advisors. Instead, Bain assumed many of Mrs. Mackey's former duties.

Mrs. Mackey responded by timely filing a complaint with HHS's Equal Employment Opportunity (EEO) counselor on June 25, 1984, alleging that Bain's appointment was an act of sex discrimination because, as the report summarized, the action had been taken to the detriment of a woman and for the benefit of a man. Mrs. Mackey also complained that Roth had trouble relating to women in managerial positions and occasionally held informal meetings in the men's room. Additionally, she complained that she was no longer being allowed to perform the duties prescribed by her job description, and that she was more qualified for the new position than was Bain, even though Bain had a doctorate and she had only a master's degree. Finally, the EEO report also mentioned that Dr. Roth had been dissatisfied with a recent Public Health Service evaluation of the Clearinghouse but that Mrs. Mackey didn't believe the evaluation was quite as bad as did Dr. Roth.

On January 7, 1985, Mrs. Mackey filed a second EEO complaint. She again alleged that she was being discriminated against because she was a woman. She cited as discriminatory treatment an incident where she had been forbidden to chair a meeting of Clearinghouse advisors even though that duty was included in her job description. She also cited as evidence of sex discrimination the fact that Bain required her to submit certain of her written work to him for review. Mrs. Mackey also complained that her supervisors were retaliating against her for her previous EEO complaint.

On February 21, 1985, Mrs. Mackey was informed that she was being reassigned to the Division of Extramural Activities (DEA). Thus, Mrs. Mackey's third EEO complaint alleged both that Bain had engaged in sex discrimination against her by requesting a large amount of work be done in a short amount of time, and that her transfer to DEA was in retaliation for her earlier EEO complaints.[1]

In 1989, Mrs. Mackey's discrimination claims were consolidated and heard before an EEOC administrative law judge (ALJ). The ALJ recommended that the agency find Mrs. Mackey had suffered no discrimination, and the EEOC adopted the ALJ's recommendation.

In January of 1990, Mrs. Mackey filed Title VII sex discrimination and retaliation claims against the Department of Health and Human Services (HHS) in the district court of the District of Columbia. Mrs. Mackey also filed a claim against the HHS under the Administrative Procedures Act, filed *Bivens* claims against several of her superiors at the National

Institutes of Health (NIH), and filed a claim for punitive damages. In 1991, the D.C. district court transferred the Title VII sex discrimination and retaliation claims to the district of Maryland where proper venue lay and dismissed all of the other claims with prejudice. In April of 1999, the district court for the district of Maryland granted HHS's motion for summary judgment against Mrs. Mackey's sex discrimination claim and denied HHS's motion for summary judgment against Mrs. Mackey's retaliation claim. After a two-day bench trial in September of 1999, the district court entered judgment for HHS on Mrs. Mackey's retaliation claim. Mrs. Mackey appeals the district court's grant of summary judgment in favor of HHS on the sex discrimination claim and the district court's entry of judgment against Mrs. Mackey on her retaliation claim.[2]

II.

Title VII of the Civil Rights Act of 1964, among other things, makes it "an unlawful employment practice for an employer -(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...sex ...." 42 U.S.C. § 2000e-2(a)(1). Mrs. Mackey essentially complains that at NIH she was accorded disparate treatment forbidden under Title VII. We review de novo the district court's grant of summary judgment against Mrs. Mackey's Title VII sex discrimination claim. Mikels v. City of Durham, 183 F.3d 323, 328 (4th Cir. 1999).

Mrs. Mackey argues that she has established a *prima facie* case of sex discrimination under the framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). As summarized in Evans v. Technologies Applications & Service Co., 80 F.3d 954 (4th Cir. 1996), under the

> *McDonnell Douglas* three-step framework, the plaintiff-employee must first prove a *prima facie* case of discrimination by a preponderance of the evidence. If she succeeds, the defendant-employer has an opportunity to present a legitimate, non-discriminatory reason for its employment action. If the employer does so, the presumption of unlawful discrimination created by the *prima facie* case drops out of the picture and the burden shifts back to the employee to show that the given reason was just a pretext for discrimination.

Evans, 80 F.3d at 959.

Under *McDonnell Douglas*, in order to establish a *prima facie* case of sex discrimination, the plaintiff must establish that (1) she is a member of a protected class; (2) her employer had an open position for which she applied; (3) she was qualified for the position; (4) she was rejected for the position under circumstance giving rise to an inference of unlawful discrimination. See Taylor v. Virginia Union University, 193 F.3d 219, 230 (4th Cir. 1999)(citations omitted).

Even if Mrs. Mackey could establish her *prima facie* case, HSS has advanced a nondiscriminatory reason for hiring Bain, arguing that he was better qualified. Bain holds a Ph. D. in chemistry and came to NIH from Illinois State University where he was chairman of the Chemistry Department. Mrs. Mackey holds a master's degree in educational psychology and had been a high school science teacher prior to beginning her employment at NIH.

Because HHS offered a legitimate non-discriminatory explanation for hiring Bain, Mrs. Mackey must demonstrate that the reason for hiring Bain advanced by HHS was pretextual. See Reeves v. Sanderson Plumbing Prods., Inc. 530 U.S. 133, 142, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). The record in this case, however, essentially is without evidence that HHS's explanation is pretext or that Mrs. Mackey suffered from intentional sex discrimination. In the end, her argument in this case is that her superiors at NIH violated standard hiring procedures by preselecting Bain and placing him into a position that took over many of Mrs. Mackey's duties, and then her superiors falsified records to cover their violations of hiring procedures. Even if Mrs. Mackey's allegations are true, Bain's preselection is not sufficient evidence for jurors reasonably to conclude that HHS's explanation for Bain's hiring was pretext. See Kennedy v. Landon, 598 F.2d 337, 341 (4th Cir. 1979)(concluding that even though preselection may have violated the rules and regulations of the state it does not evidence the type of discrimination prohibited by Title VII). In her first formal EEO complaint, Mrs. Mackey alleged that Roth had trouble relating to women in managerial positions and that he occasionally held informal meetings in the

men's restroom. These assertions are not supported in the record.

Under the McDonnell Douglas framework, in order to survive a motion for summary judgment, the plaintiff must have developed some evidence on which a juror could reasonably base a finding that discrimination motivated the challenged employment action. Reeves, 530 U.S. at 148. Mrs. Mackey has no such evidence. Thus, we affirm the district court's denial of her sex discrimination claim.

III.

Mrs. Mackey also appeals the denial of her motion for summary judgment on her retaliation claim, and, in addition, the entry of judgment on the merits for the defendant after full trial of the retaliation claim in open court. The order denying her motion for summary judgment is not an appealable order. Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, especially Part II, p. 1234 (4th Cir. 1995). So we review the entry of judgment in favor of NIH after full trial on the merits of that claim.

In order to establish a *prima facie* case of retaliation, Mrs. Mackey must prove three elements: first, that she engaged in protected activity; second, that an adverse employment action was taken against her; and third, that there was a causal link between the protected activity and the adverse employment action. Laughlin v. Metro. Washington Airports, 149 F.3d 253, 258 (4th Cir. 1998).

On appeal from a bench trial, we may set aside findings of fact only if they are clearly erroneous. Fed. R. Civ. P. 52(a). We review the district court's conclusions of law de novo. Resolution Trust Corp. v. Maplewood Invs., 31 F.3d 1276, 1281 n. 7 (4th Cir. 1994). In the district court's findings of facts and conclusions of law, delivered from the bench, the court found that it was undisputed that Mrs. Mackey had established the first element of her *prima facie* case of retaliation by engaging in protected activity in the form of her various employment complaints but that she had failed to prove the second and third elements. Thus, the district court found that Mrs. Mackey had not proven that she suffered an adverse employment action when, although the job she had been transferred to may not have been as challenging and satisfying as her previous one, Mrs. Mackey lost no pay or benefits and was even subsequently qualified for promotion to a GS-14.

The district court also found that there was no causal connection between Mrs. Mackey's EEO complaints and her transfer. Instead, the district court found credible Laurence's testimony that the reorganization, in which individuals other than Mrs. Mackey were also transferred, was made because the Clearinghouses had budgetary problems and were duplicative and inefficient.[3] As the district court also found, the only evidence that Mrs. Mackey's transfer was causally connected to the EEO complaints she filed was the opinions of Mrs. Mackey herself. A plaintiff's own self-serving opinions, absent anything more, are insufficient to establish a *prima facie* case of discrimination. See Goldberg v. B. Green & Co., 836 F.2d 845, 848 (4th Cir. 1988).

At this point, it is well to note the reliance of the district court on the testimony of Laurence in open court at the trial of the retaliation claim, the gist of which was that the department was ineffective and had to be reorganized.

> Mr. Laurence was a straightforward gentleman who testified about the decisions that had to be made and he gave clearly the reasons for the reorganization, and I wrote them down. I listened to him. He said basically that the three clearinghouses had budgetary problems. They were duplicative. They were not efficient, not cost effective, and contracts expired at different times. It was cumbersome. It was not smooth in operation. And all of those things caused [him] and Dr. Renault, I believe, and others to reach a decision around 1985 that there had to be a reorganization and a transfer of the clearinghouses to the Public Information Division. Opinion of district court, J.A. 821-822.

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> Mr. Laurence considered what was available at NIH and looked at the various experience that people had and made a decision to, as best he could, find a place that could best utilize the experience and the talent of plaintiff and others and say hopefully that they would get a challenging, enjoyable career. Opinion of district court, J.A. 822.

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> I believe that the defense here has presented a legitimate, neutral, non-discriminatory reason for its action. We may not like it. We may disagree ...but there has been no evidence presented here so far as I am concerned that shows this was any pretext. So I believe they have presented a valid, legitimate, neutral, non-discriminatory reason that has been articulated to support the action, testified by Mr. Laurence, whose testimony I accept and find it credible. Opinion of district court, J.A. 826-827.

So the district court laid off the problems suffered by Mrs. Mackey to the necessary reorganization of her department because of inefficiency, not because of retaliation for filing claims of discrimination because of sex. We agree.

The judgment of the district court is accordingly

*AFFIRMED.*[4]

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

FN1 Mrs. Mackey tells us that over a period of several years, she had also filed seven informal complaints of sex discrimination and retaliation in addition to the three formal complaints discussed above.

FN2 Mrs. Mackey also seeks to appeal error allegedly committed by the district court for the District of

Columbia when it dismissed Count III of her complaint, which was Mrs. Mackey's claim for damages under the APA. The district court found that Count III did not state a claim and dismissed it with prejudice in March of 1991. Mrs. Mackey's motion for rehearing was denied. The dismissal was affirmed by the United States Court of Appeals for the District of Columbia Circuit in January of 1993. Mrs. Mackey's petition for rehearing was denied. There is no authority which would allow us to review the decisions of the United States Court of Appeals for the District of Columbia Circuit or the District Court for the District of Columbia. We therefore do not address further that part of Mrs. Mackey's appeal.

FN3 Laurence had previously given a deposition in the case.

FN4 The denial of a Rule 30(b)(6) deposition for the plaintiff is not reversible error. The request of the plaintiff to withdraw her motion to strike a part of the NIH brief is granted.

Civil Action No. AW-97-324

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

BILLIE BRYAN MACKEY,
Plaintiff,

v.

DONNA SHALALA, Secretary, Department of Health and Human Services,
Defendant.

April 26, 1999.

COUNSEL: For Plaintiff: John F. Karl, McDonald and Karl, Washington, D.C.

For Defendant: Lynn A. Battaglia, United States Attorney, A. David Copperthite, Assistant United States Attorney, Baltimore, Maryland.

JUDGES: Alexander Williams, Jr., United States District Court Judge.

OPINION BY: Alexander Williams, Jr.

MEMORANDUM OPINION

Pending before the Court are Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, and Plaintiff's Cross-Motion for Partial

Summary Judgment. Each party has opposed the other's respective motion, and replied accordingly. No hearing is deemed necessary. Local Rule 105.6 (D. Md.). For the reasons that follow, the Court will deny Defendant's motion in part, and grant it in part, and deny Plaintiff's motion.

## BACKGROUND

From 1980 to 1984, Plaintiff, Billie Bryan Mackey, had been the Director of the National Digestive Diseases Education and Information Clearinghouse (hereinafter the "Clearinghouse"), a GS-13 grade level position, at the National Institutes of Health ("NIH") in Bethesda, Maryland. The Clearinghouse is an arm of the Division of Digestive Diseases that provides research information to health care providers and organizations interested in the digestive diseases field. As director, Mackey worked with outside contractors, served as a liaison between the Clearinghouse and various digestive diseases committees, and chaired meetings of Clearinghouse advisors. From the time she began working at NIH in 1966, and prior to her appointment as director of the Clearinghouse, Mackey had worked in other assignments dealing with scientific communications. Then, in February of 1984, Mackey received a memorandum from Dr. Harold Roth, Director of the Division of Digestive Services, informing her that Dr. Ralph Bain was named as her immediate supervisor, and she would thereafter report to him. Mackey, however, would later learn that Bain was not only appointed as her supervisor, but he also would assume most of her responsibilities as director.

Dr. Ralph Bain began his employment at NIH in 1982 as a special expert, a non-federal position created

pursuant to the Intergovernmental Personnel Act, 42 U.S.C. § 4701 *et seq.* This position was originally designated as a two-year appointment in which Bain acted as Executive Director of the National Digestive Diseases Advisory Board. [FN 1] Apparently, members of the Division of Digestive Diseases, including Roth, and Earl Laurence, Executive Director of the National Institute of Arthritis, Diabetes, and Digestive and Kidney Diseases, were impressed by Bain's work and credentials and sought to have him hired as a permanent federal employee. However, because of Bain's status as a short-term, temporary non-federal employee, a special request had to be made for his conversion.

NIH guidelines provide that the conversion of special experts to competitive Civil Service, or permanent federal employee, positions are subject to the Office of Personnel Management ("OPM") certification requirements and NIH review and clearance procedures. *See* Pl's Cross-Mtn for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 25, excerpt from NIH Manual, 2300-304-1 (L)(1) at 8. These procedures require the agency that is seeking to convert a special expert to answer a series of comprehensive questions concerning the candidate, the agency's recruitment efforts, and the nature of the position sought. *Id.*, Ex. 28. OPM and NIH believe that these procedures are necessary in ensuring that its employment system, particularly with regard to conversion cases, adheres strictly to the merit principle and provides for fair and open competition for vacancies. *Id.*

Thus, when Roth and Laurence sought to convert Bain to the permanent position of Health Scientist Administrator, they were required to follow both the

NIH and OPM procedures.[FN 2] As such, Defendant alleges that in accordance with procedure, the position was advertised from February 21, 1994 to February 28, 1994. Defendant further maintains that eight candidates applied for the position, but Bain was ultimately selected. Mackey, however, never applied for the position.

Once selected, Laurence filed the necessary paperwork with the Assistant Director of Operations for NIH's Department of Personnel Management ("DPM"), Helen Stafford, to convert Bain from the position of special expert to Health Scientist Administrator. However, Stafford denied the request because the position, as created and described by Laurence, involved short-term duties, which was considered inappropriate for a permanent civil service placement. *Id.*, Ex. 12. She further noted that unless it could be shown that the Health Scientist Administrator position was of "a continuing nature necessitating a competitive appointment," a conversion would not be considered. *Id.*

In response to the denied request, Laurence created another position for Bain. This position, Program Director for Scientific Program Evaluation, was of a continuing and permanent nature, and was to be served in the Division of Digestive Diseases. In addition, a significant portion of the duties of the newly created position were already being performed by Mackey as director of the Clearinghouse.

However, unlike in the first instance, the position for Program Director for Scientific Program Evaluation was never advertised and no efforts were made to recruit candidates other than Bain.[FN 3] In spite of

this fact, the paperwork for the new position that was submitted for DPM's approval indicated that it was advertised and that eight candidates were considered [FN 4] Nonetheless, the position of Program Director for Scientific Program Evaluation and the request to convert Bain to a permanent federal employee were approved.

With Bain in his new position, Mackey was stripped of her previous responsibilities of working with outside contractors, serving as a liaison between the Clearinghouse and the other digestive diseases committees, and chairing meetings of Clearinghouse advisors. Dismayed, Mackey filed an administrative complaint with a Department of Health and Human Services Equal Employment Opportunity ("EEO") counselor on June 25, 1984. *See id.*, Ex. 39. Therein, she alleged that Bain's appointment as her supervisor was in violation of NIH and OPM procedures with regard to special experts being converted to permanent employee status. [FN 5] *Id.; see also id.*, Ex. 26. She further claimed that she was more qualified than Bain, despite the fact that she had a master's degree and he a doctorate, for the position of Clearinghouse director because of her expertise in education and information retrieval, as well as her knowledge of digestive diseases. *Id.* Mackey also complained that she was relieved of her duties and responsibilities in contravention of her position description as director of the Clearinghouse.

Although Mackey's complaints were filed with the EEO counselor, she alleged very little in the way of actual gender-based discrimination. In fact, the EEO counselor's report is scant with regard to any

allegations of intentional discriminatory conduct. The most substantive of the allegations are that Roth, at times, conducted informal meetings in the men's restroom, thereby preventing her participation, and that Roth had difficulty in relating to women in managerial positions. *Id.* Mackey did not provide the EEO counselor with any other specific instances of discrimination, other than her assertion that Bain's appointment as her supervisor constituted gender discrimination in that it was "taken to the detriment of a woman (herself) for the benefit of a man (Dr. Bain)." *Id.*

Then, in January of 1985, Plaintiff filed a second complaint with the EEO counselor. *See id.*, Ex. 40. This time, Mackey alleged that after Bain was made her supervisor she was denied an opportunity to chair a meeting of advisors to the Clearinghouse, she had to submit all of her written communications to Bain for approval, that she was given difficult assignments with short turn around times, and that she was denied a pay increase. *Id.* Mackey characterized all of these allegations as being gender-based discrimination and retaliatory for her filing the first EEO complaint. *Id.*

On February 21, 1985, Mackey was informed that she was being reassigned to the Division of Extramural Activities ("DEA") effective February 25, 1985. Perceiving her reassignment as another example of gender discrimination, Mackey brought it to the attention of the EEO counselor in her third complaint filed in February of 1985. *See id.*, Ex. 34. While most of the allegations in this complaint were either the same as, or similar to, those described in the previous complaints, Mackey did cite her recent reassignment as

evidence of discriminatory conduct and retaliation for her filing the previous complaints. *Id.*

Mackey continued to file complaints with the EEO alleging gender discrimination and retaliation, and grievances with NIH. Then, in 1989 her discrimination claims were consolidated and heard before an EEOC administrative law judge ("ALJ"). The ALJ recommended that the agency find that no discrimination had occurred. The EEOC adopted the ALJ's recommendation, and issued Mackey a right-to-sue letter. Mackey subsequently filed an action in the U.S. District Court for the District of Columbia.

On the Defendant's Motion to Dismiss All Claims Except Those Based on Title VII or, in the Alternative, for Summary Judgment, and to Transfer Plaintiff's Title VII Claims, the D.C. District Court dismissed Counts III through V, leaving only the Title VII claims. [FN 6] *See Mackey v. Sullivan*, 1991 WL 128570, No. 90-0007 (D.D.C. filed Mar. 28, 1991). The court also granted Defendant's motion to transfer the case to the District of Maryland on the grounds that the District of Columbia was an inappropriate venue. *See id.; see also* 42 U.S.C. § 2000e-5(f)(3) (Title VII venue statute). Now, pending before this Court are Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, and Plaintiff's Cross-Motion for Partial Summary Judgment. The Court will address the substance of each motion below.

## DISCUSSION

### I. Standard of Review on Summary Judgment

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but

rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986) (citations omitted). Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 250, 591 L. Ed. 2d 202 (1986). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *Runnebaum v. Nationsbank of Md., N.A.*, 123 F.3d 156, 164 (4th Cir. 1997) (citing *Anderson*, 477 U.S. at 255).

To defeat a motion for summary judgment, the party opposing the motion must present evidence of specific facts from which the finder of fact could reasonably find for him or her. *Anderson*, 477 U.S. at 252; *Celotex*, 477 U.S. at 322-23. However, when a court is confronted with cross-motions for summary judgment, it must consider each party's motion individually to determine if that party has satisfied the summary judgment standard. *See* 10A Charles A. Wright *et al.*, Federal Practice and Procedure, § 2720 (1983). Thus, in determining whether genuine and material factual disputes exist, the Court has considered the parties' respective memorandums and the many exhibits attached thereto, and construed all facts, and all reasonable inferences drawn therefrom, in the light most favorable to the respective non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 587-88, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).[FN 7]

II. Gender Discrimination

The original objective of Congress in enacting Title VII of the Civil Rights Act was to achieve equality in employment opportunities through the eradication of discriminatory barriers. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) ("The language of Title VII makes plain the purpose of Congress to ensure equality of employment opportunities and to eliminate those discriminatory practices and devices . . . ."). Congress, however, "did not enact Title VII as a panacea for every setback that members of a protected class suffers in their place of employment." *Riley v. Technical and Management Services Corp., Inc.*, 872 F. Supp. 1454, 1460 (D. Md. 1995). Thus, there must be some proof of intentional discrimination in order for a claim to lie. The plaintiff cannot simply point to an adverse employment action and declare that it was in violation of Title VII solely because she is a member of a protected class. Instead, the plaintiff must establish that the adverse employment decision would not have been made "but for" for her protected class status. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n. 10, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976).

Here, Mackey's charges of being deprived an opportunity to apply for certain positions, having her responsibilities as director of the Clearinghouse taken away, and being denied a promotion, all because of her gender, essentially boil down to a claim of

discriminatory failure to promote and disparate treatment under Title VII. As such, Mackey must proceed in establishing that these alleged employment actions were motivated by discriminatory animus. Thus, to meet her burden on summary judgment, Mackey can offer direct or circumstantial evidence, or utilize the proof scheme set forth in *McDonnell Douglas Corp. v. Green.*

"To satisfy ordinary principles of proof, [Mackey] must provide direct evidence of a purpose to discriminate or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact." *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 959 (4th Cir. 1996) (citing *Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988)). The record here provides very little, if any, direct or indirect evidence of discriminatory conduct undertaken by the Defendant. As mentioned, Mackey has alleged that Roth, at times, conducted informal meetings in the men's restroom, and has difficulty relating to women in managerial positions. However, these bald allegations and unsubstantiated assertions cannot, without more, establish a prima facie case of gender discrimination. *See Evans*, 80 F.3d at 959. As such, Mackey will have to resort to the *McDonnell Douglas* proof scheme to satisfy her burden.

Since Mackey can only rely upon circumstantial evidence to prove that an illicit criterion motivated her employer to take the alleged adverse employment actions, its failure to promote, she must prove that (1) she is a member of a protected class; (2) her employer had an open position for which she applied or sought to apply; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances

giving rise to an inference of unlawful discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Evans*, 80 F.3d at 959; *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir. 1994). Once proven, an inference of discrimination is raised which Defendant may rebut with evidence of a legitimate, nondiscriminatory reason for its actions. *Evans*, 80 F.3d at 959; *Carter*, 33 F.3d at 459. If the Defendant succeeds, the inference of discrimination drops from the case, *id.*, and Mackey must then demonstrate that the reason advanced by Defendant is pretextual and in fact motivated by discriminatory intent. *Vaughan v. MetraHealth Companies, Inc.*, 145 F.3d 197, 202 (4th Cir. 1998).

It is clear that Mackey satisfies the first element as a woman. As for the remaining elements, the facts are not as clear cut. With regard to the second element, when the position for Health Scientist Administrator was allegedly advertised, Mackey did not apply. Then when the second position, Program Director for Scientific Program Evaluation, was created, Mackey claims that it was not advertised. Taking these facts in the light most favorable to Mackey, it appears that she would not be able to establish that her employer had an open position for which she applied or sought to apply. However, "the burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. Thus, the Court will assume that had the second position been advertised, Mackey would have applied.

This brings the Court to the third and fourth element. The records suggests that Mackey was a qualified candidate, albeit, in Defendant's view, not the most qualified.[8] However, as for the fourth element, the

Court has serious doubts about whether it has been satisfied. While the Court may be willing to allow Mackey the inference that had the position been advertised she would have applied, it seems somewhat of a stretch to then infer that she was rejected for the position. Although establishing a prima facie case has been characterized as a "relatively easy test," *see Young v. Lehman*, 748 F.2d 194, 197 (4th Cir. 1984), the Court does not believe that it allows for the piling of inference upon inference to satisfy its elements.

Nonetheless, Defendant has articulated a legitimate, non-discriminatory reason for selecting Bain instead of Mackey. First, the position required that the candidate have, among other things, experience with biomedical research programs, a broad scientific background with administrative and management experience, experience in working with scientists and lay persons, an ability to plan and evaluate programs, an understanding of the federal research grant process, and experience in planning and conducting scientific conferences and meetings. Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 46. The evidence also shows that recognition for scientific accomplishment, and invitations to speak or present papers before a scientific organization would be considered in evaluating the candidate's qualifications. Further, Laurence suggested that he felt that a scientist would be the best qualified candidate for the position. *See* Def's Mtn. for S.J., Laurence Depo., Ex. 2 at 199.

Accordingly, Defendant claims that it chose Bain for the position because of his exceptional qualifications. Bain holds a Ph.D. in chemistry, he acted as chairman of the chemistry department at an Illinois university, he served as a principal investigator on an NIH grant, was

awarded a nationally-recognized fellowship by the American Council on Education, and published several articles. Conversely, Mackey has an undergraduate degree in biology, and a master's degree in educational psychology. While she had worked for NIH since 1966, and had extensive experience in scientific communications, Mackey is not a scientist, and does not appear to have a specialized knowledge of multiple scientific disciplines.

Despite Mackey's claim that her qualifications are superior to that of Bain, Defendant "has discretion to choose among equally qualified candidates provided the decision is not based upon unlawful criteria." *Wileman v. Frank*, 979 F.2d 30, 38 (4th Cir. 1992) (citation omitted); *see also Beall v. Abbott Labs*, 130 F.3d 614, 620 (4th Cir. 1997) ("'[i]t is the perception of the decision maker which is relevant' not the self-assessment of the plaintiff.") (quoting *Evans*, 80 F.3d at 960-61). As such, even if Mackey's qualifications were equal to that of Bain's, Defendant's decision to select Bain is not discriminatory, unless it is shown that the decision was based on proscribed criteria. Thus, Mackey must demonstrate that the reason advanced by Defendant is pretextual and in fact motivated by discriminatory intent. *Vaughn*, 145 F.3d at 202. This will require her to show that the reason she was not promoted was because of her sex, and not her qualifications. *See Evans*, 80 F.3d at 960. The Court, however, does not sit as a "super-personnel department determining, without regard to [Defendant's] ability to assess the full dimension of its employees' qualifications and its ability to view its employees in a work environment, whether its perception of an employee's qualifications is erroneous." *Evans v. Technologies Applications &*

*Services Co.*, 875 F. Supp. 1115, 1120 (D. Md. 1995). Thus, to show pretext, Mackey must show discrimination.

Mackey has failed to present any proof that Defendant's explanation is pretextual and that she is the victim of intentional discrimination. She simply asserts that Defendant's explanation is not worthy of any credence because the hiring of Bain was in violation of established OPM and NIH policies and procedures. Her arguments, however, are unpersuasive.

From the outset, this case sounded more so of an employee grievance, than gender discrimination. The essence of Mackey's EEO complaints, the pleadings filed in the instant action, and her arguments made on summary judgment, all involve her dissatisfaction with the circumstances surrounding the way in which Bain was hired, and the apparent circumvention of NIH's hiring and promotion procedures. This, coupled with the absence of any proof of intentional discrimination, cannot sustain an action for gender discrimination under Title VII. *See Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir. 1987) (stating that it is not necessarily pretext for discrimination if the "employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement."). Mackey must bear in mind that "Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute." *E.E.O.C. v. Flasher Co., Inc.*, 986 F.2d 1312, 1321 (10th Cir. 1992) (quoting *Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir. 1987)).

Beyond Mackey's failure to offer any evidence of intentional discrimination, the record supports Defendant's position that the decision to hire Bain was not based on illegal criteria. For instance, when the Health Scientist Administrator position was advertised, eight people applied. Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 10. Of those eight, one was female, and one a minority male. *Id.* When Bain was selected for the position, seven men and one woman, or seven white candidates and one minority, were denied. Under these facts, it is difficult to perceive any discriminatory intent on the part of Defendant, particularly when both male and female candidates were considered, but not selected. A discriminatory motive, cannot, as a matter of law, be invariably inferred from alleged violations of NIH's hiring policies. *See e.g. Holder v. City of Raleigh*, 867 F.2d 823, 826 (4th Cir. 1989). Accordingly, the Court finds that Mackey has failed to demonstrate a genuine dispute of material fact with regard to her charge of gender discrimination for her being denied a promotion to the position of Program Director for Scientific Program Evaluation.[9]

In light of the Court's findings, Mackey also cannot maintain a claim premised on her allegations that she was denied an opportunity to chair a meeting of advisors to the Clearinghouse, that she had to submit all of her written communications to Bain for approval, that she was given difficult assignments with short turn around times, and that she was denied a pay increase. These allegations are merely endemic to an employee who reports to a supervisor. Once Bain's appointment as her superior was held to be non-discriminatory, the indirect effect that this new position had on Mackey's

responsibilities and authority must also be considered discrimination free.

III. Retaliation

To establish a prima facie claim of retaliation in violation of Title VII, a plaintiff must show that (1) she engaged in protected activity; (2) the defendant took an adverse employment action against her; and (3) a causal connection existed between the protected activity and the adverse action. *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 258 (4th Cir. 1998). The defendant may then rebut the prima facie case by showing that there was a legitimate non-discriminatory reason for the adverse action, *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 242 (4th Cir. 1995), after which the burden shifts back to the plaintiff to show that those reasons are pretextual. *Id.*

Defendant argues that Mackey's retaliation claim must be dismissed because she failed to allege that she suffered an adverse employment action as a result of her protected activity. In particular, Defendant claims that her reassignment to the Division of the Extramural Programs in February of 1985 did not constitute an "adverse employment action" because it did not involve an "ultimate decision," such as hiring, granting leave, discharging, promoting, or compensating.

The Fourth Circuit, in defining what constitutes an adverse employment action, has "consistently focused on the question of whether there has been discrimination in what could be characterized as ultimate employment decisions, such as hiring, granting

leave, discharging, promoting, and compensating." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981). Defendant claims that this interpretation of an adverse employment action would preclude a reassignment and transfer because they are only mediate actions. However, the Fourth Circuit has not specifically addressed whether a reassignment can be considered an adverse employment action. *But see DiMeglio v. Haines*, 45 F.3d 790, 804 & n. 6 (4th Cir. 1995) (a reprimand and reassignment *may* constitute an adverse employment action.). Thus, the Court has looked to other circuits for guidance.

What the Court has found most persuasive is the line of decisions that have defined an adverse employment action as a "materially adverse change in the terms and conditions of employment" that might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). The courts deciding these cases have held that a transfer or reassignment moving a plaintiff from an "elite" position with opportunity for advancement to a less prestigious position with little opportunity for professional growth is sufficiently adverse to satisfy the second prong of the plaintiff's prima facie case of retaliation. *See De La Cruz v. New York City Human Resources Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364 at 364-69 & n. 9 (6th Cir. 1977) (holding that even though job transfer involved "no change in hours and no reduction in salary"

and plaintiff "had not at all times been diligent and punctual in attendance" transfer from position as executive secretary to senior vice president to "just a clerical position" in the purchasing department was adverse job action.). These courts have recognized that Title VII does not limit an adverse employment action to a decision that only affects monetary considerations, since an employer can make an employee's job undesirable or unbearable without affecting that employee's salary or benefits. *See e.g. Torre v. Casio.*, 42 F.3d 825, 831 n. 7 (3d Cir. 1994) (transfer to a "dead-end job" would be an adverse employment action); *Collins v. Illinois*, 830 F.2d 692, 702-04 (7th Cir. 1987) (lateral transfer involving same pay and benefits but change in responsibilities held to be an adverse employment action); *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987) (transfer to different job in different department with no reduction in salary but lower grade and denial of application for another job in same department).

However, those courts that have interpreted the scope of "adverse employment actions" more broadly have generally held that a purely lateral transfer, one that does not involve a demotion in form or substance, or a transfer involving no more than a minor change in working conditions, cannot rise to the level of a materially adverse employment action. *See Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (Posner, J.). These limits are intended to prevent "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like" from forming the basis of a discrimination suit. *Id.*

Here, Mackey claims not only that her reassignment to the DEA was retaliatory, but was to a "career dead-

end" position that does not have any promotion potential. In support of her contention, Mackey has directed the Court to the testimony of Dr. Walter Stolz, Director of the DEA, who explained that when he received word, via a telephone call, that Mackey was to be reassigned to his division he was not given any specifics regarding what her new duties and responsibilities would be. Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Stolz Depo., Ex. 31 at 11-12. Essentially, Stolz stated that he was told "you've got this employee, find something for her to do." *Id.* at 13; *see also id.*, Ex. 33 (Mackey's Notification of Personnel Action of her Reassignment which describes her new position title as "Unclassified Duties"). Moreover, Stolz testified that at the time she was reassigned, there was not even a position available for her to fill in her then current capacity as a GS-13 Technical Information Specialist. Stolz stated that he had to "think of things that [he] needed to be done" in order to find work for Mackey and keep her busy. *Id.* at 12. Eventually, Mackey was given a series of assignments that included drafting minutes for meetings, performing evaluations of the success of various grants or contract programs, updating catalogs, and creating an Intranet for employees within the division. [10] *Id.* at 16-19. Although she was not demoted grade-wise, Mackey claims that these duties are low-level functions that are more appropriate for a GS-7, GS-8, and GS-9 grade level employee, rather than a GS-13 like herself.

In light of this evidence, the Court believes that Mackey can make out a prima facie case for retaliation under Title VII. First, it is undisputed the she engaged in protected activity when she lodged her series of

complaints with the EEO counselor. Second, the reassignment to the DEA that entailed a substantial change in her job duties and responsibilities constituted an adverse employment action. Third, there is sufficient evidence in the record to raise more than an inference the a causal connection existed between the protected activity and the adverse action. Thus, Mackey is entitled to an inference of discrimination, *see Munday*, 126 F.3d at 242, which Defendant may rebut by showing that there was a legitimate, non-discriminatory reason for the adverse action. *Id.*

Here, Defendant has attempted to articulate a legitimate, non-discriminatory reason for Mackey's transfer to the DEA. *See Munday*, 126 F.3d 239 at 242. Defendant claims that in 1985, NIH and the Clearinghouse experienced a reorganization that resulted in several employees being transferred to other divisions. Defendant cites the testimony of Laurence in support of its contention that Mackey was one of the employees affected by this reorganization. However, Laurence never testified to this effect. When asked if he remembered why he transferred Mackey to the DEA, Laurence stated generally that "we transferred the clearinghouses to our Public Information Office," but never stated that Mackey was one of those individuals affected by the reorganization. Def's Mtn. for S.J., Laurence Depo., Ex. 2 at 29. In fact, Laurence testified that he "did not remember the time frame in which Ms. Mackey was transferred from the clearinghouse." *Id.*

While the Defendant does not have the burden to persuade the Court that it was actually motivated by the proffered reasons, it must, however, produce enough admissible evidence to raise a genuine issue of

fact as to whether it discriminated against Mackey. *See Burdine*, 450 U.S. at 254-55; 101 S.Ct. 1089; *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). The only evidence that Defendant has produced is the testimony of Laurence, which the Court believes is not legally sufficient to justify a judgment for Defendant. *See id.* Furthermore, the initial Notification of Personnel Action for Mackey's reassignment does not indicate that she was being transferred as a result of some reorganization. In fact, the only basis or explanation that is provided on the Notification for the reassignment is the general authority given to department heads, pursuant to 5 U.S.C. § 3341, to temporarily "detail employees among the bureaus and offices of his department."[11] 5 U.S.C. § 3341. Accordingly, the Court believes that Defendant has failed to produce sufficient admissible evidence that its proffered reason was legitimate and non-discriminatory. Thus, a genuine dispute of material fact exists with regard to Mackey's claim of retaliation.

IV. Conclusion

In accordance with the Court's findings, Defendant's motion for summary judgment will be granted with regard to the Title VII claim of gender discrimination, and denied as to the Title VII claim of retaliation. Plaintiff's cross-motion for partial summary judgment will be denied as to the request for entry of judgment on the claim of gender discrimination, and entry of judgment, as a matter of law, on the claim of retaliation. As for Plaintiff's request for judgment that "the hiring of Mr. Bain violated the Federal Equal Opportunity Recruitment Program," the provision of the Civil Service Reform Act, 5 U.S.C. § 7201(c)(1), providing

for the establishment of minority recruitment programs within federal agencies does not give rise to a private cause of action. *Scipio v. Weinberger*, 622 F. Supp. 47, 48 (N.D. Ill. 1985). Finally, as for Plaintiff's request for partial summary judgment with regard to the grievances she filed pertaining to violations of OPM and NIH hiring policies, the U.S. District Court for the District of Columbia dismissed these charges in its March 28, 1991 Memorandum Opinion and Order, and therefore they may not be relitigated again here. A separate Order consistent with this Opinion will follow.

Footnotes

FN1. Prior to coming to NIH, Bain was chairman of the chemistry department at an Illinois university.

FN2. It appears from the record that this position, Health Scientist Administrator for the Division of Digestive Diseases, was created by Laurence specially for Bain. *See* Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 13.

FN3. There is a genuine dispute with regard to whether the second position was advertised. Defendant has provided no evidence that conclusively shows that the position was in fact advertised. Mackey, on the other hand, claims that it was not. As this issue was raised by Defendant in its motion for summary judgment, the Court will view the facts in the light most favorable to Mackey, and consider the position to not have been advertised.

FN4. It appears from the record that the same information, e.g. position description, candidates considered, recruitment efforts, etc., used to certify the

first position was also used for the second. *Compare* Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 10 and Ex. 15.

FN5. Mackey's allegations of violations of NIH and OPM procedures appear to be based on, *inter alia*, section 1-3(b) of the Federal Personnel Manual, which reads: The improper employment of experts and consultants is not only illegal, it is wasteful and destroys the morale of the career specialists. Examples of improper employment of an expert or consultant are to: give a particular person temporary or intermittent appointment solely in anticipation of a career-conditional appointment, do a job that can be done as well by regular employees, do a full-time continuous job, avoid competitive employment procedures, or avoid General Schedule pay limits.

Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 5, excerpt from Federal Personnel Manual (January 22, 1982), § 1-3(b).

FN6. The district court dismissed all of Mackey's claims alleging violations of OPM and NIH personnel policies.

FN7. As for Defendant's motion to dismiss, because the opposing parties have both submitted evidence outside the complaint which the Court has considered, the motion will be treated as one for summary judgment. *See* Fed. R. Civ. P. 12(b) (stating that a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to be converted into a motion for summary judgment whenever matters outside the pleading are presented to and accepted by the court); *see also Jacobson v. AEG Capital Corp.*, 50 F.3d 1493

(9th Cir. 1995). Accordingly, Defendant's motion to dismiss will be denied as moot.

FN8. Defendant insists that the position required the candidate to have a Ph.D. degree, and since Mackey only held a master's degree, she was not qualified for the position. However, the rating criteria that was used to rate the applicants for the position states that a candidate with a "Ph.D. degree (or equivalent) in a health or physical science field plus moderate agency-related training" or a "Ph.D. degree or M.S. degree with substantial agency-related training" would be considered. Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 46.

FN9. Defendant also argues that Mackey has failed to timely exhaust her administrative remedies within the statutory requisite thirty day period. *See* 29 C.F.R. § 1613.214(a)(1)(i) (1990). However, the record shows that she first sought EEO counseling on June 25, 1984. This was eleven days after she received the memo from Roth that Bain was being appointed her supervisor. *See* Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Ex. 39. Thus, Mackey has timely exhausted her administrative remedies.

FN10. Interestingly, when Stolz was asked to explain Mackey's duties he characterized some as "small things," and others as "not a big deal." Pl's Cross-Mtn. for Partial S.J. and Opp. to Def's S.J. Mtn., Stolz Depo., Ex. 31 at 16-18.

FN11. 5 U.S.C. § 3341 (1970) provides in part:

> (a) the head of an Executive department . . . may detail employees

among the bureaus and offices of his department . . . .

(b) Details under subsection (a) of this section . . . may be for not more than 120 days. These details may be renewed by written order of the head of the department, in each particular case, for periods not exceeding 120 days.

No. 99-2582

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BILLIE BRYAN MACKEY,
Plaintiff-Appellant,

v.

DONNA E. SHALALA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; EARL L. LAURENCE, Individually; CLIFFORD MOSS, Individually; RALPH BAIN, Individually; HAROLD ROTH, Individually,
Defendants-Appellees.

ORDER

5/11/04

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Widener, Judge King, and Judge Seymour.

No. 92-5063
United States Court of Appeals,
District of Columbia Circuit.

Billie Bryan MACKEY, Appellant,

v.

Louis W. SULLIVAN, M.D., Secretary of HHS, et al.

Jan. 5, 1993.
Rehearing Denied May 19, 1993.

Before SILBERMAN, BUCKLEY and KAREN LECRAFT HENDERSON, Circuit Judges.

ORDER

PER CURIAM.
Upon consideration of the motion to dismiss in part and for summary affirmance, the opposition thereto and the reply, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its decision filed March 28, 1991, with respect to the dismissal of the appellant's claims. Because all relevant actions occurred in Maryland and the relevant parties worked and resided in Maryland, the district court was without jurisdiction to entertain the appellant's claims. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C.Cir.1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C.Cir.) (per curiam), *cert. denied*, 449

U.S. 994 (1980). It is

FURTHER ORDERED that the appeal from the district court's order transferring the remainder of the complaint be construed as a petition for writ of mandamus. *See In re Sosa*, 712 F.2d 1479, 1480 (D.C.Cir.1983) (per curiam) (transfer decisions reviewed by petition for writ of mandamus). It is

FURTHER ORDERED that the petition for writ of mandamus be denied. A writ of mandamus will issue to block a transfer only upon a showing that the district court grossly abused its discretion. *In re Tripati*, 836 F.2d 1406, 1407 (D.C.Cir.1988) (per curiam). Mackey has made no such showing here. As mentioned earlier, Mackey and the appellees are employed in Maryland, the events alleged in the complaint occurred primarily in Maryland, and proof of the allegations will involve evidence and witnesses located in Maryland.

Accordingly, the Maryland district court is the proper forum for Mackey's claims.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C.Cir. Rule 15.

Civ. A. No. 90-0007.
United States District Court,
District of Columbia.

Billie Bryan MACKEY, Plaintiff,

v.

Louis W. SULLIVAN, M.D., et al., Defendants.

March 28, 1991.

John F. Karl, Jr., Bradley G. McDonald, McDonald & Karl, Washington, D.C., for plaintiff.

Fred E. Haynes, United States Attorney's Office, Washington, D.C., for defendants.

*MEMORANDUM OPINION*

THOMAS F. HOGAN, District Judge.

Now before the Court is Defendants' Motion to Dismiss All Claims Except Those Based on Title VII or, in the Alternative, for Summary Judgment, and to Transfer Plaintiff's Title VII Claims. For the reasons stated below, the Court shall grant the defendants' motion to dismiss Counts III, IV, and V, and defendants' motion to transfer the plaintiff's remaining Title VII claims, Counts I and II, to the United States District Court for the District of Maryland.

*Background of the Case*

During the summer of 1980, the National Institute of Arthritis, Metabolism, and Digestive Diseases

established a National Digestive Diseases Education and Information Clearinghouse ("the Clearinghouse"). The plaintiff was selected to head the Clearinghouse and was named Clearinghouse Director, a GS-13 position. Her immediate supervisor from 1980 through early 1984 was Dr. Harold P. Roth. Earl Lawrence had certain supervisory functions over Dr. Roth.

In a February 15, 1984, memorandum, the plaintiff was notified that, effective March 1, 1984, Dr. Ralph Bain would be her direct supervisor. Sometime around February 25, 1984, Dr. Bain was designated as the Executive Director of the Clearinghouse. In June, 1984, the plaintiff was notified that Dr. Bain was assuming her responsibilities as Project Director (Project Officer) for the Clearinghouse's contract with InterAmerica Inc. Also, sometime prior to June 1984, the plaintiff had served as the chairperson for meetings of the Advisory Committee. When the Advisory Committee met in June, Dr. Fairer served as the Chairperson.

In June or July, 1984, the plaintiff was denied approval to attend two training courses. In addition, the plaintiff was asked to submit her correspondence for review by Dr. Bain. She was also prohibited from attending a meeting for Clearinghouse Project Officers since, according to the Deputy Executive Officer of NIADDK, Dr. Bain was the Project Officer and he would be the appropriate person to attend.

In June, 1984, the plaintiff began complaining that her rights as a federal employee were being violated. Administrative hearings on the plaintiff's consolidated discrimination claims were held in 1989, and the EEOC administrative judge recommended that the agency

find that no discrimination had occurred. The agency adopted the administrative judge's recommendation, and the plaintiff subsequently filed suit in this Court.

Counts I and II of the plaintiff's complaint allege violations of Title VII, 42 U.S.C. § 2000e, *et seq.* Count III alleges that the defendants' refusal to process plaintiff's grievances was arbitrary, capricious and an abuse of discretion in violation of the APA, 5 U.S.C. § 706(2)(A). Count IV alleges a *Bivens* action against the individual defendants. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Count V asks for punitive damages for the defendants' alleged reckless, wanton and malicious conduct.

*Discussion*

I. *Transfer of Title VII Claims*

The Court shall first take up defendants' Motion to Transfer Plaintiff's Title VII Claims for Improper Venue. Venue in Title VII actions is governed by 42 U.S.C. § 2000e-5(f)(3) which states:

Such an action may be brought in any judicial district in the state in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, *but if the respondent is not found within any such district*, such an action may be brought within the judicial district in which the respondent has his principal office ... (emphasis added).

This statute preempts all other federal venue provisions that otherwise might apply. *Stebbins v. State Farm Mutual Automobile Ins. Co.*, 413 F.2d 1100 (D.C.Cir.), *cert. denied*, 369 U.S. 895 (1969).

In the case at hand, the plaintiff brings her action in the judicial district where the Department of Health and Human Services has its principal office. However, the plaintiff may *only* bring such an action if none of the other venue requirements of Title VII can be met. *See Archuleta v. Sullivan*, 725 F.Supp. 602, 604-05 (D.D.C.1989). Since the Department of Health and Human Services can be "found" in any of the three preferred forums, insomuch as the United States Attorney may accept services in any of the three preferred forums, venue in the District of Columbia is improper.

It is clear that the three preferred forum requirements may be met by the District of Maryland. First, the allegedly unlawful employment practices--sex discrimination and harassment--took place at the National Institutes of Health ("NIH"), which is located in Bethesda, Maryland. Second, the plaintiff's employment records relevant to the unlawful employment practice are maintained at NIH in Maryland. Finally, the plaintiff always worked and continues to work for the defendant Department of Health and Human Services in the Maryland offices of NIH.

The plaintiff alleges that venue is proper in the District of Columbia since forms required to effect Dr. Bains's appointment were signed in the District. However, even if one assumes that these documents are relevant

to the plaintiff's case, the existence of a document signed by someone whom the plaintiff has not claimed was aware of the alleged improprieties surrounding the appointment, is not enough to make venue proper in the District of Columbia.[FN 1]Venue cannot lie in the District of Columbia when "a substantial part, if not all, of the employment practices challenged in this action" took place outside Washington even though actions taken in the District of Columbia "may have had an impact on plaintiff's situation." *Donnell v. National Guard Bureau*, 568 F.Supp. 93, 94 (D.D.C.1983). The Court shall, therefore, transfer Counts I and II of the plaintiff's complaint to the District of Maryland.

II. *Administrative Procedure Act Claim*

In addition to alleging a violation of Title VII, the plaintiff also alleges that defendants' actions in processing her grievances were arbitrary, capricious and not in accordance with the law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"). The Court shall dismiss this claim since there is no separate cause of action under the APA or otherwise to challenge the handling of an EEO complaint.

The only right established by Title VII is the right to be free from discrimination. *Hall v. E.E.O.C.*, 456 F.Supp. 695, 700 (N.D.Cal.1978). Even assuming all of the plaintiff's allegations were true, the right to be free of discrimination is wholly preserved by the right to a trial *de novo. Id.*

This remedy explicitly provided by Congress strongly implies that Congress did not intend that charging

parties be able to force the EEOC, by means of suit or the threat thereof, to more fully or speedily investigate or attempt to conciliate their charge. Instead, a charging party dissatisfied with the EEOC may, under § 706(f)(1), circumvent the EEOC entirely and file his own suit. *Id.* at 699. Therefore, the Court shall dismiss Count III of the plaintiff's complaint, alleging violations of the APA, for failure to state a claim upon which relief can be granted.

III. *Claims Against Individual Defendants*

There are several reasons this Court shall dismiss the plaintiff's claims against the individual defendants. Any one basis would serve as an adequate basis for dismissal.

A. *Lack of Personal Jurisdiction Over Individual Defendants*

None of the individual defendants reside in the District of Columbia, therefore depriving the Court of this basis for asserting jurisdiction over these defendants. As to those defendants who reside outside of the District, the Court may obtain jurisdiction over them only pursuant to the terms of the District of Columbia long-arm statute. *See* D.C.Code §§ 13-423(a)(1)-(6).

The allegations of the plaintiff's complaint do not bring the individual defendants within the scope of the D.C. long-arm statute. The complaint alleges that the individually-sued defendants, who are all residents of Maryland, made certain official personnel decisions at NIH in Maryland. The defendants did not make the decisions of which the plaintiff complains in the District

of Columbia. Therefore, this cannot serve as a basis for asserting personal jurisdiction over the defendants. Likewise, the complaint fails to allege that the plaintiff has suffered any tortious injury in the District of Columbia. The D.C. long-arm statute provides, in relevant part:

A District of Columbia court may exercise personal jurisdiction over a person who acts directly or by agent, as to a claim for relief arising from the person's-- (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia; (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, [or] engages in any other persistent course of conduct ... in the District of Columbia.

D.C.Code § 13-423(a).

This section of the D.C. long-arm statute, too, fails to provide a basis for personal jurisdiction over the individual defendants since the plaintiff fails to allege that she has suffered tortious injury in the District of Columbia.

The plaintiff bears the burden of establishing personal jurisdiction. *See Naartex Consulting Corp v. Watt*, 722 F.2d 779, 787 (D.C.Cir.1983), *cert. denied*, 467 U.S. 1210 (1984). The plaintiff, here, has failed to assert facts constituting a basis for this Court to assert personal jurisdiction over the individual defendants pursuant to the D.C. long-arm statute.[FN 2] The Court shall dismiss the claims against the individual defendants pursuant to Rule 12(b)(2) of the Federal Rules of Civil

Procedure for lack of jurisdiction over the individual defendants.

B. *Failure to Meet Heightened Pleading Standard*

The Supreme Court held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that a cause of action exists against federal officials individually for violations of a person's constitutional rights while acting in an official capacity. To make such a claim, however, the plaintiff must allege a specific deprivation of his or her rights by each defendant with specific factual allegations as to each alleged deprivation. Failure to make such specific allegations deprives the Court of subject matter jurisdiction and requires dismissal. *See Carlson v. Green*, 446 U.S. 14, 18 (1980).

This Circuit has explained on several occasions that *Bivens* plaintiffs are held to a "heightened pleading standard" which requires plaintiffs "at the very least [to] specify the 'clearly established' rights they allege to have been violated with ... precision." *Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C.Cir.1987), *quoting Smith v. Nixon*, 706 F.2d 197, 200 (D.C.Cir.1986) and *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1084 (1985).

The plaintiff's complaint fails to meet this heightened pleading standard since it fails to allege the deprivation of any clearly established constitutional or statutory rights. The plaintiff alleges nothing more than ordinary federal personnel actions involving assignment of duties and supervisory responsibilities. There is no indication that the trivial actions complained of by the

plaintiff violated clearly established constitutional rights. Therefore, the Court shall dismiss Count IV of the plaintiff's complaint for lack of subject matter jurisdiction.

C. *Recovery of Money Damages*

The plaintiff cannot maintain a civil action for money damages, including punitive damages, since Congress has already provided a means by which the propriety of certain adverse personnel actions can be reviewed. This Congressionally-approved remedy is exclusive. *See Bush v. Lucas*, 462 U.S. 367 (1983).

In *Bush*, the Supreme Court found that the Civil Service Reform Act represented a system of "comprehensive procedural and substantive provisions giving meaningful remedies against the United States." *Id.* at 368. The existence of the Act is, therefore, a "special factor counselling hesitation" in creating a *Bivens* remedy. *Id.* at 389-90, citing *Bivens*, 403 U.S. at 397. This is true despite the fact that the Act did not provide complete relief to the plaintiff:

Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. *Id.* at 389.

This Circuit has reaffirmed the principle that the inadequacy of the remedy afforded by the statute does not warrant a court-ordered remedy under *Bivens*. *See Spagnola v. Mathis* and *Hubbard v. U.S. Environmental Protection Agency*, 859 F.2d 223 (D.C.Cir.1988).

In both *Spagnola* and *Hubbard*, the plaintiffs sought *Bivens* relief because the Civil Service Reform Act afforded no damages remedy. Despite the absence of an opportunity for financial compensation for the alleged loss of job or promotion, and despite the absence of an available administrative remedy to test their allegations of infringement of their constitutional rights, the Court of Appeals held that no *Bivens* remedy should be implied. This reasoning extends to the plaintiff's claims of discrimination, as well. *See Brown v. General Services Administration*, 425 U.S. 820 (1976).

With this in mind, the Court finds yet another basis for dismissal of the plaintiff's *Bivens* claims, Counts IV and V of the complaint, for failure to state a claim upon which relief may be granted.

*Conclusion*

For the reasons set forth above, the Court shall transfer the plaintiff's Title VII claims, Counts I and II, to the District of Maryland, and dismiss Counts III, IV and V pursuant to Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure.

*ORDER*

In accordance with the Memorandum Opinion issued in the above-captioned case on March 28, 1991, it is this 28th day of March, 1991, hereby ORDERED that

(1) Plaintiff's Title VII claims, Counts I and II, shall be transferred to the District of Maryland;

(2) Counts III, IV and V of the plaintiff's complaint

shall be dismissed with prejudice.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

FN1. The government has demonstrated, by means of affidavit, that records relevant to the allegedly unlawful practices are not located at the Department of Health and Human Services headquarters in the District of Columbia, but rather are located at NIH in Bethesda, Maryland. Plaintiff's assertions calling this affidavit into doubt are unsupported by any facts suggesting that the affidavit is false.

FN2. Even if the plaintiff were able to bring the individual defendants within the ambit of the D.C. long-arm statute, personal jurisdiction over the defendants would not fall within the scope of due process which requires that defendants have "minimim contacts" with the forum in which the action was brought and that those actions are of such a character "that the maintenance of the suit would not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (citations omitted). This standard generally requires "some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws[,]" *Hanson v. Denckla*, 357 U.S. 235, 253 (1957), and some nexus between the contacts with the forum and the basis of the cause of action. *Toro Company v. Ballas Liquidating Co.*, 572 F.2d 1267, 1269 (8th Cir.1978). The evidence before the Court, as well as the plaintiff's allegations themselves, establish that the Court's assertion of personal jurisdiction over the individual

defendants in this action would offend these accepted notions of due process.

# REQUEST FOR PERSONNEL ACTION

Part I

C. Personnel Action Requested: *Conv to Perm Appt.*
D. Proposed Effective Date: *ASAP*
E. Requested By: *Mr. L. Earle Laurence, Executive Officer, NIADDK*
H. Approved By: *L. Earl Laurence, Executive Officer, NIADDK*
I. Remarks by Requesting Office: *Dr. Bain will continue to serve as Executive Director for the National Digestive Diseases Advisory Board and, in addition, serves as Health Scientist Administrator in the Division of Digestive Diseases and Nutrition, with major responsibilities for Clearinghouse Program Activities.*

Part II

1. Name: *Bain, Ralph*
2. SSN: *326-26-1854*
3. Date of Birth: *05-08-33*
10. FLSA: *Exempt*
11. Sex: *M*
12: Citzenship: *1-US*
15. Annuitant Indicator: *9. Non Applicable*
16. Work Schedule: F. Full-time
20. From: *Expert*
21. Name and Location of Employing Office: *NIADDK, Office of the Director, Office of Administrative Management*
22. Pay: EE -1320
25. Salary: *$55,787.00*

26. Pay Basis: *PA*
27. TO: *Health Scientist Administrator*
29. Pay Plan & Occupational Code: *GM-601*
30. Grade or Level: *14*
31. Step or Rate: *8*
32. Salary: *$52,690.00*
33. Pay Basis: *PA*
34. Duty Station: *Bethesda, Maryland*
35. Position Occupied: *2. Executive*
36. Appropriation Code: *48325487 14065*